No. 84-480

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

P.I.A. ASHEVILLE, INC.;
FIRST WASHINGTON GROUP, INC.;
CONSOLIDATED HEALTH SYSTEMS, INC.; and
PSYCHIATRIC INSTITUTES OF AMERICA, INC.,
Petitioners

v.

STATE OF NORTH CAROLINA, ex rel.,
RUFUS L. EDMISTEN, Attorney General,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether congress impliedly repealed the antitrust laws with respect to hospital acquisitions explicitly approved by state regulatory agencies acting pursuant to their authority under the National Health Planning and Resources Development Act.

2. Whether hospital acquisitions receiving approval by a state agency are immune from antitrust review under the "state action" doctrine.

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ARGUMENTS

I.

ANTITRUST IMMUNITY IS NOT IMPLIED FROM THE NATIONAL HEALTH PLANNING AND RESOURCE DEVELOPMENT ACT.

The Petitioner's contention is that Congress intended the regulatory process undertaken by North Carolina under the provisions of the NHPRDA, to displace the antitrust laws. The case law nor the Petitioners' arguments bear this contention out.

Neither the NHPRDA nor the North Carolina Certificate of Need Law, G.S. 131-175 *et seq.*, contain any express immunity from the antitrust laws. This

being the case, immunity, if any, must be implied. Implied repeals in the antitrust field have not found favor in our courts since *United States v. Borden Company,* 308 U.S. 188 (1939), and if immunity is to be implied by a statute, there must be a "plain repugnancy" between the statute and the antitrust laws, *United States v. Philadelphia National bank,* 374 U.S. 32 (1963), and even then the antitrust laws may be repealed only to the "minimum extent necessary" to obviate the clear repugnancy, *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963).

The Fourth Circuit in its reported opinion of this case stated that there was no justification in the language of the NHPRDA, or in its legislative history, to find that Congress intended for antitrust immunity to be part of the NHPRDA. (Pet. App. 10a-22a). The Respondent embraces the language and reasoning as set out in that opinion.

II.

The "STATE ACTION" DOES NOT GRANT AN EXEMPTION FROM THE ANTITRUST LAWS.

Where the antitrust laws conflict with a state regulatory scheme, the "state action" doctrine provides, that to the extent that the state's enforcement of its own public policy and statutory scheme is inconsistent with the federal antitrust laws, the conduct is exempt from antitrust scrutiny *Parker v. Brown,* 317 U.S. 3412 (1943). To qualify for state action immunity, the Midcal test is used which requires that the State have a "clearly articulated state policy" and there must be ongoing state supervision of the statutory scheme. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

Without conceding that the first part of the Midcal test has been met in the case at hand, the respondent contends that the second part, active supervision, has certainly not been met. Under the North Carolina statute, there is a total absence of supervision after the issuance of a Certificate of Need. The State makes no attempt to monitor the use of the acquisition and there is no provision for the regulation of post acquisition prices. N.C.G.S. 131-175 to 131-187.

Petitioners' argument, "That even if the Court reaffirms Midcal in its entirely, it makes no sense to add a gloss, as the Fourth Circuit did requiring continuing supervision of a one time event", does not wash. The acquisition may well be a one time event, but if the overriding aim of the NHPRDA is to buttress competition, this can only be accomplished by some type of post acquisition supervision.

In the case at hand, the PIA Group initiated the alleged anticompetitive action and the State of North Carolina merely approved the acquisition. The State did not compel the acquisition. The PIA Group should bear the responsibility for the private acquisition if such acquisition violated the antitrust laws.

CONCLUSION

The Petition of Writ of Certiorari should be denied.

Respectfully submitted this the 13th day of November, 1984.

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CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Petition for Certiorari has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

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This is the 13th day of November, 1984.

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